

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
3                   AT CHARLESTON

4                   TRANSCRIPT OF PROCEEDINGS

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8   IN RE:   ETHICON, INC., PELVIC REPAIR                   MDL NO.  
9   SYSTEM PRODUCTS LIABILITY LITIGATION                2:12-MD-2327  
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13                   TELEPHONIC MOTIONS HEARING

14                   May 14, 2013

15  
16                   BEFORE THE HONORABLE **CHERYL A. EIFERT**  
17                   MAGISTRATE JUDGE  
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1 P R O C E E D I N G S

2 MAGISTRATE JUDGE EIFERT: Hello. Can you tell me  
3 who all is on the phone, please?

4 MR. CARTMELL: Tom Cartmell.

5 MR. ALYSTOCK: Bryan Alystock is here, Your Honor.

6 MS. BAGGETT: Renee Baggett.

7 MR. THOMAS: Good afternoon, Your Honor. David  
8 Thomas. On the phone with me is Ben Watson from Butler  
9 Snow; Chad Hutchinson from Butler Snow; and Phil Combs from  
10 Thomas Combs.

11 MAGISTRATE JUDGE EIFERT: All right, great.

12           Okay. I have read both of the briefs that have been  
13   filed. And it looks to me as though there is even some  
14   disagreement as to what's outstanding.

15           So, let me ask the plaintiffs to start off since it's  
16   their motion to compel and tell me -- what topics do you  
17   still have disagreement about?

18 MR. CARTMELL: Your Honor, this is Tom Cartmell.  
19 I apologize, first of all. I'm on a cell phone. I'm  
20 traveling and in a parking lot at, at Dunkin' Donuts. So,  
21 if you can't hear me, just let me know.

22 But I did read the response and I do believe that there  
23 were documents that, that were produced after we filed our  
24 motion. But I do think that on -- and, of course, we have  
25 not had a chance to, obviously, get and see the documents

1 that were produced today and, and Friday.

2 But I, I do believe that with respect to the SOPs,  
3 which is A, and the design history file testimony, I think  
4 there's still -- I think there are maybe some disagreements  
5 about what is outstanding. But from our perspective, I do  
6 believe that most of these still have issues outstanding.

7 MAGISTRATE JUDGE EIFERT: Okay. So, the topics,  
8 then, that -- the topics that I have down here as, as having  
9 some disagreements would be A, B, C, I, S, and KK. Is that  
10 correct? A, B, C, I, S, and KK?

11 MR. CARTMELL: I think on C, members of the  
12 product development team, there's, there's an issue about  
13 whether or not the witness will be able to testify related  
14 to that versus just a production of a list.

15 On B, project names for the device, the issue's the  
16 same, I believe.

17 I think patents maybe there is not an issue, which is  
18 E.

19 MAGISTRATE JUDGE EIFERT: Okay. I, I tell you  
20 what I'm looking at. I'm looking at Exhibit A that was  
21 attached to the deposition notice. And I am looking at the  
22 deposition subject matter.

23 I have A as being the SOPs; B as being the design  
24 history file; C as being the members of the product  
25 development team. I would be the project names. S would be

1 patents. And KK would be design controls and validation.

2 So, those are the letters that I'm using. Are you  
3 using a different set of letters?

4 MR. CARTMELL: I think I was looking at the  
5 response from the defense. I apologize. But, yes, I'll use  
6 those letters. I apologize.

7 MAGISTRATE JUDGE EIFERT: Okay. So, starting with  
8 A, which is the SOPs, you believe there are still some  
9 outstanding issues. Is that correct?

10 MR. CARTMELL: Yes.

11 MAGISTRATE JUDGE EIFERT: All right. Tell me what  
12 the issues are.

13 MR. CARTMELL: Well, we -- if I can just give you  
14 a little bit of history and clarify, Your Honor, because I  
15 am a little concerned based on, you know, the response that,  
16 that I read that there may be, you know, some feeling that  
17 we have not met our, our obligation to meet and confer.

18 And I want to be, you know -- you know, this is the  
19 first motion for, to compel that we have filed, and we did  
20 not take it lightly at all. And I want to be very clear  
21 that before we filed our motion, and especially with respect  
22 to the Standard Operating Procedures, we had never been told  
23 that those procedures would be produced to us before the  
24 deposition. We didn't know that. And I now know that  
25 they've done that.

1 I will tell you that we, we cannot have those  
2 downloaded in time, Crivella West has told us, for this  
3 deposition.

4 And, you know, as far as sort of the background, this  
5 started in July of last year with our request for these  
6 SOPs. In January as we were serving our regulatory and our  
7 design and development 30(b)(6) and then realizing that the  
8 SOPs with the date and revision history was not there. We  
9 then met and conferred over and over and over again.

10 And the way that sort of things have happened is  
11 they've told us that they will produce Standard Operating  
12 Procedures -- or, or what they told us is they'd produce us  
13 an index.

14 And we got that index. It was attached to this motion.  
15 I responded to it. I was told that that was a partial list  
16 of Standard Operating Procedures, and that it only included  
17 some of the procedures. And it did include, I think, a  
18 thousand procedures.

19 And we took the time to send it to our experts and, you  
20 know, try to pare it down for them. We never told them that  
21 we believed that, you know, we should not get the specific  
22 Standard Operating Procedures that were requested in the  
23 design notice. And to this day, we have never received any  
24 of those, of those.

25 I guess now they are in this production that we will

1 not get until after the deposition has started. So, we  
2 don't know exactly what's there, although we have been --  
3 the way we have been doing it -- because we kept saying,  
4 "Look, we don't want to happen what happened with the Lin,  
5 Susan Lin deposition." And, that is, we went two days of  
6 the deposition and we did not have a production of the  
7 relevant Standard Operating Procedures with the revisions  
8 and things like that. That was in March, March 12th and  
9 13th.

10 We then came back on May 2nd and 3rd for two more days  
11 of those depositions. And they had produced to us some of  
12 the relevant procedures, including revision dates. But the  
13 way they would be produced is that we would send an e-mail  
14 and say, "Look, we need this for Susan Lin. We need them  
15 all, but we especially need this one and we're going to have  
16 to move this deposition if we can't get them."

17 So, one by one -- and I believe before the May 2nd and  
18 3rd deposition we got a few of them. We did not get them  
19 all. We do not still have the regulatory SOPs.

20 With respect to the design 30(b)(6) notice that is now  
21 set for tomorrow and the next day, way back during the Lin  
22 period we were saying with respect to the design, "We also  
23 expect those as far as the version and the effective date of  
24 the, each of the policies."

25 We didn't hear anything. We didn't hear anything. I



1 started sending e-mail after e-mail saying, "Look, we're  
2 getting closer to that. We need these. And I especially  
3 need this." I responded to that index, but never intended  
4 for that to be all of the policies because they told us that  
5 that was only part of the list. So, I kept saying, "Where's  
6 the other half?" or, "Is there another part of this index?  
7 We need to look at that too."

8 We decided, look, we really can't move back these  
9 depositions. We're already in May. And we've been arguing  
10 about this since, you know, February when Dan Smith's  
11 deposition was originally scheduled to go in March. But we  
12 pushed it back.

13 Now we're at the point where we have a part list of the  
14 policies. We know that some of the policies have not been  
15 produced, and we've told them that. We're going on an  
16 e-mail by e-mail basis where they will produce things. I  
17 kept saying, "Just -- when you get them all, just send them  
18 to us."

19 And by the time we filed our motion, we had never heard  
20 anything but, "We're working on it." I've never -- I know  
21 their motion seems to reflect that they had told us they  
22 were coming, but we had never been told they were coming.  
23 And I promise you faithfully I would not have filed the  
24 motion if they had called.

25 And we sent the motion over to them before we filed it

1 and said, "Hey, take a look at this. We're going to file  
2 this. But, you know, we want to give you a chance to talk  
3 about it. The Dan Smith deposition is coming up. People,  
4 we've got to get ready for this. We can't have happen again  
5 what happened the first time." And we didn't hear anything  
6 back from them.

7 But if they had said, "Tom, we're getting ready to dump  
8 on you, you know, two complete productions of 180 policies,"  
9 then I would not have filed that, although I will say we're  
10 still unclear on whether or not that is everything and  
11 whether or not they're going -- they're still objecting to  
12 letting the witness testify, I guess, to, to different  
13 versions and things like that.

14 And I will say, Your Honor, that's the other thing  
15 that, that sort of put us in a, in a crummy position. And,  
16 that is, ten days before this deposition -- I think it was  
17 like five or six or seven days before Susan Lin's  
18 deposition, after weeks of meeting and conferring on topics  
19 and us agreeing to amend the topics, we get in both cases  
20 objections and responses to our notice where there is an  
21 objection to every single one of our topics and every single  
22 one of the document requests. And these always come right  
23 before the deposition when we've had meet-and-confers for  
24 ages before that.

25 So, I said to them, "Listen, I don't feel like we can

1 go forward with a deposition with all these objections here  
2 because how do I know your witness or you are not going to  
3 fall back on, even though (recording inaudible) on these  
4 objections when you didn't -- how do I know that your  
5 production is complete when you have all these objections?"  
6 They wouldn't, they wouldn't withdraw those. So, we decided  
7 we can't wait. We have to go forward.

8 But with respect to the SOPs, I guess what we would  
9 request the Court is for an order compelling them to produce  
10 the SOPs related to the design and development. And I know  
11 their motion says that they've produced 180 SOPs, but that's  
12 just not true.

13 That 180 SOPs that I asked them -- agreed to look  
14 through and tear down and asked them for included regulatory  
15 SOPs, quality assurance SOPs, pharmacovigilance SOPs, and  
16 SOPs from all different types of departments.

17 So, there's really only 30 or 40 I would estimate -- I  
18 haven't counted -- SOPs for the design and development  
19 deposition that, you know, we would like to have. And we'd  
20 like to have the dates because what happens is when we don't  
21 have the dates and the effective dates and the revision  
22 dates, then we say, "This happened in 2005. Which policy  
23 applies?" And the witness says, as in New Jersey, you know,  
24 "I don't know if that was the policy in effect at the time."

25 And they told us they were only going to let their

1 witnesses talk about the current policies. We said, "We  
2 can't, we can't do that. We need all of them."

3 So, I guess we'd ask for an order compelling them to  
4 produce the relevant design and development policies. We're  
5 obviously not going to have them by the time of the  
6 deposition because we can't -- Crivella cannot get them  
7 downloaded in time and we won't be able to review them. But  
8 an order telling them that the part list is not sufficient.

9 We need to see the rest of the list of the policies,  
10 and then an order, I guess, that the witness can testify  
11 about the policies, or they can definitely name somebody  
12 else.

13 And I've always said to them, "Look, you have  
14 designated Dan Smith for 30 subjects and on literally seven  
15 products. And it's more than that because then you have the  
16 TVT-L and TVT-Blue and things like that.

17 So, I agree that it's extremely difficult for one human  
18 being to memorize and know all this. And I said to them,  
19 "I'm surprised that you really want to put one person up.  
20 We will take the depositions of multiple people and we'll,  
21 we'll get dates to you and we'll do this."

22 But they've insisted on Dan Smith to do it all. And,  
23 and now their argument is that it's so, such a big job  
24 because there's so many policies for seven products and  
25 different time periods stemming from 1998 to 2013 that they

1 can't do it.

2 So, I guess that's our request with respect to the  
3 SOPs.

4 MAGISTRATE JUDGE EIFERT: Okay. Just to make my  
5 position clear, this motion was filed just a few days ago, a  
6 few work days ago. It required an expedited hearing because  
7 the deposition is tomorrow. I am not prepared sitting here  
8 today to address motions to compel documents in the future.  
9 That can be taken up at a later time. What I'm here today  
10 at a quarter till five to do is figure out how I can help  
11 you with your deposition tomorrow.

12 Now, I don't think what you're telling me is getting to  
13 the crux of what I want to hear today. I understand you  
14 haven't gotten documents you believe you're entitled to get.  
15 And perhaps you are entitled to get them all and perhaps  
16 that's the way the Court will order it to be done.

17 But let's talk about the deposition tomorrow. Is that  
18 deposition going to go forward?

19 MR. CARTMELL: Yes.

20 MAGISTRATE JUDGE EIFERT: All right. So, looking  
21 at the SOPs and where you sit with them this afternoon for a  
22 deposition that's tomorrow, tell me what I can do to help at  
23 least narrow the issues or identify the issues so that when  
24 you have someone testify tomorrow, we all know what they're  
25 going to be testifying about. Let's start with A which is

1 the SOPs.

2 MR. CARTMELL: I, I guess to the extent that we  
3 are able to, to find SOPs that the witness can testify about  
4 the revisions -- I think the argument that they've made is  
5 there's too much to talk about multiple revisions over  
6 multiple years. That would be our only request, Your Honor.

7 MAGISTRATE JUDGE EIFERT: Okay. And, and I've got  
8 to tell you when I look at your notice, I do think that is a  
9 very broad category, a very broad area, subject area. And I  
10 don't, I don't really know exactly what it is you're aiming  
11 for when you say you want someone to testify about the SOPs.

12 If you have the SOPs and you can read the SOPs, then  
13 I'm certain that there are some things you don't need a  
14 person to testify about. And maybe you can narrow your  
15 questions a little bit more.

16 I think what I can do with that one is order the  
17 witness to testify, to the extent the witness can, about the  
18 SOPs that have already been produced. I don't know what  
19 else I can do. I mean, it's a very broad, it's a very broad  
20 topic.

21 MR. THOMAS: Your Honor, this is David Thomas.  
22 And Ethicon is prepared to do that as long as the lack of  
23 knowledge or perhaps even incorrect answers by the witness  
24 about documents that he hasn't seen or hasn't been shown or  
25 hasn't had a reasonable definition of what he's expected to

1     testify about, that that can't be imputed to the company as  
2     a lack of knowledge or an incorrect answer.

3             We, we want Dan Smith to be able to help them as best  
4     as we can tomorrow. But the problem is with 181 SOPs and  
5     with revision histories, it's thousands and thousands of  
6     pages of documents. He's not going to know the answer to  
7     all the questions. And we just don't want the company to  
8     have to live with his answers on those questions.

9             And what I was going to ask for on this one and all the  
10    others is because the way these depositions are taken, as  
11    corporate representatives, these witnesses are being shown  
12    documents and asked questions. And, obviously, their  
13    answers bind the company.

14            And I think -- I believe, and the law requires, that  
15    they describe with reasonable particularity those issues  
16    they want this witness to be prepared to address so that he  
17    can be prepared to address them. And the, the number of  
18    documents in A and all the following categories are so  
19    general in nature that no witness can be prepared on them.

20            And, so, if we can help them with Dan Smith and not  
21    bind the company to things where he just doesn't know,  
22    because we just don't know what he's going to be asked about  
23    them, that would be something we'd like to do.

24            MAGISTRATE JUDGE EIFERT: Well, I don't, I don't  
25    really -- I don't really know all of the history as to why

1 these SOPs haven't been produced before. I don't know if  
2 they were asked to be produced at some point in the past or  
3 whether the first time they ever came up was with these  
4 notices of deposition. So, I don't really know the history.

5 MR. CARTMELL: Your Honor, I can answer that.

6 MAGISTRATE JUDGE EIFERT: But before you answer  
7 that, I think for tomorrow's purpose I cannot -- I certainly  
8 cannot sit here and say that your corporate representative  
9 is not going to bind the corporation. Obviously, the  
10 corporate representative will bind the corporation.

11 That doesn't mean that you can't supplement answers or  
12 have a supplemental deposition at which things are  
13 clarified. But I think when he testifies about something,  
14 he's going to bind the corporation.

15 I don't know how useful his testimony is going to be on  
16 these SOPs tomorrow if the plaintiff hasn't received them in  
17 time to even read them and there is 180 of them with 20 plus  
18 revisions to each one. I, I really don't know how useful  
19 this deposition is going to be.

20 But I'm not really hearing anything from you-all as to  
21 how I can help make it anymore useful. I mean, I certainly  
22 don't know what to tell you to do. It's -- you're,  
23 you're -- I can tell you -- I can tell you, Mr. Cartmell,  
24 your topics are very broad. And I think you're going to  
25 have to narrow them down in some way. There's -- they



1 could, they just could cover virtually anything. I think  
2 they're too broad.

3 Maybe part of the problem is you haven't read through  
4 all of these SOPs yet and don't really know where your  
5 questions are going to be. But that's going to have to  
6 happen in the future.

7 Now, tomorrow I think maybe you can just muddle through  
8 the best you can and we can deal with the consequences of it  
9 later because I don't -- I'm not hearing anything that's  
10 going to help on, on topic A.

11 MR. CARTMELL: Okay. And I do think -- you have  
12 helped and I, I think you're right. We, we will -- we're  
13 not going to be able to see all the policies. I'm glad --  
14 we did not know when we filed this if they were going to  
15 produce those. And now they have been produced, so we do  
16 have to look at them.

17 And the only thing I'll say, Your Honor, is that we  
18 have tried to specifically say, you know, B, design control  
19 policies, I believe. And that is a limited number of things  
20 like the policy on the SMEA, the DBSA. And those are the  
21 only ones we want. And those are the ones that I know that  
22 Dan Smith is very well familiar with.

23 MAGISTRATE JUDGE EIFERT: Okay. Now, Mr., --

24 MR. THOMAS: Your Honor, --

25 MAGISTRATE JUDGE EIFERT: -- Mr. Thomas, have you

1 now produced all of the SOPs that have been requested or are  
2 there still some out there?

3 MR. THOMAS: Can I give you a little bit of  
4 history and give you a little longer answer than that?

5 MAGISTRATE JUDGE EIFERT: If you don't make it too  
6 long.

7 MR. THOMAS: I won't. I want to go home too.

8 At plaintiffs' request, we gave them a spreadsheet of  
9 documents on March the 28th of 891 documents from our  
10 database that we were able to search and retrieve. And from  
11 that, plaintiffs identified on April the 23rd, less than  
12 three weeks ago, three weeks ago, a list of 181.

13 So, it's been in the last three weeks that we've been  
14 gathering the 181 documents and with all the history and all  
15 the revisions that have been produced in the last two days,  
16 Friday and Monday.

17 So, that's the history. It's been -- really, in the  
18 last three weeks we've had a list to work from to make the  
19 production.

20 I'm advised today that we're confirming that we  
21 produced all 181 and that there may be some that are  
22 missing. And we're trying to confirm which are missing, and  
23 we hope to follow up on that right away. But we, we cannot  
24 confirm that all 181 that the plaintiffs requested have been  
25 produced. There may be a few short. But we're trying to

1 fix that immediately.

2 MAGISTRATE JUDGE EIFERT: Have they now seen the  
3 index for all of the ones that exist? Because I heard -- I  
4 thought I heard Mr. Cartmell say that what you, what you  
5 sent to him, this index or spreadsheet, didn't include all  
6 of the SOPs that are out there. It was half of them or  
7 something to that effect.

8 MR. THOMAS: I think that it's quite a bit more  
9 than half. Here's the way it's been explained to me, Your  
10 Honor. There's a database of documents at the company  
11 called the adaptive database that contains almost 100,000  
12 documents. The company does not maintain these documents  
13 as, quote, SOPs. They have a bunch of different names.

14 So, in order to generate a list from which plaintiffs  
15 could select the -- Mr. Watson can probably speak to this  
16 better -- enter search terms in the database that would  
17 generate the list of 891. And that was our best effort to  
18 identify the universe of documents that might contain the  
19 documents Mr. Cartmell would be interested in. And it's  
20 from that list of 891 that we gave on March the 28th that  
21 Mr. Cartmell on April 23rd gave us a list of 181.

22 MAGISTRATE JUDGE EIFERT: Okay.

23 MR. THOMAS: And, so, that's how we did it.

24 MAGISTRATE JUDGE EIFERT: All right. Well, I  
25 think, then, on that particular issue, as far as whether

1 there are still documents that haven't been produced, you  
2 two are going to have to talk a little further on that and  
3 decide what, if anything, is still out there.

4 As far as the deposition tomorrow, I think the witness  
5 needs to try to answer to the best, to the, to the best  
6 extent that he can the questions that are asked about the  
7 SOPs that the plaintiff has reviewed and feels capable of  
8 asking questions about.

9 So, we'll have to leave that one at that. And then  
10 we'll just have to pick it up later as far as whether it  
11 needs to be narrowed and, and that sort of thing. I, I  
12 don't think there's anything else we can do for tomorrow.

13 So, let's move on to B, which is the design history  
14 files. What, what is the dispute that remains with that?

15 MR. CARTMELL: Your Honor, the dispute is we've  
16 asked the witness to give testimony about the contents of  
17 the design history file and to confirm that there is a  
18 document that is a complete design history file.

19 And the reason we've asked specifically for that is  
20 because we know from testimony that there is a file that  
21 they keep in a, in a central file room that is called the  
22 design history file for each product. Now, when we get it  
23 produced to us, it comes all over the place. We don't get  
24 it produced to us in consecutive Bates numbers in most  
25 instances.

1 And, so, what we'd like to do is simply have a witness  
2 who can testify, "Here's the design history file for TVT-O.  
3 This is the contents of that." And they have checklists.

4 And, so, literally it would not be as burdensome as  
5 saying, you know -- go through the checklist, but just to  
6 say, "Is this the checklist?" Put a sticker on it. Say,  
7 "This is the design history file for TVT-O." That exhibit  
8 can then be -- that's an admission by the company that that  
9 is it. That can then be used as an exhibit in all the  
10 depositions.

11 Obviously, there's a clip that can be played if we need  
12 to at trial related to that so that we know because what  
13 happens, we also know, is that with fact witnesses and  
14 things, they will say, "I don't know that that's everything.  
15 I don't know that that's, whether that's a draft or not."  
16 And, and we get, we get produced multiple drafts of things.

17 But we just want to nail down. That's all we're trying  
18 to do. And we think it will promote judicial, you know,  
19 efficiency and limit resources and we won't have to go take  
20 as many depositions primarily if we can just get a corporate  
21 witness to say, "This is the design history file for each of  
22 the products."

23 MAGISTRATE JUDGE EIFERT: Well, that seems  
24 reasonable.

25 What's wrong with that, Mr. Thomas?

1           MR. THOMAS: Well, we've agreed to identify under  
2 a sworn affidavit discovery response that this is the design  
3 history file. What we don't want to have happen and what  
4 we're trying to seek protection from is questions about the  
5 entire design history file for this one witness because the  
6 design history file is not something you're going to put one  
7 bull clip on and mark and attach to a deposition. It's,  
8 it's boxes and boxes of documents in a design history file.  
9 And a design history file varies from product to product.  
10 It's not going to be the same for each product.

11           And, so, we will identify for them the Bates range of  
12 documents that go in each design history file that we have.  
13 And we think that is sufficient to identify that without a  
14 witness being questioned about the contents of that file for  
15 all of these products -- because for the same reason you  
16 can't be prepared on the, the previous documents in category  
17 A, a witness can't be prepared without anymore reasonable  
18 particularity about all the documents in the design history  
19 file.

20           MR. CARTMELL: Can I respond, Your Honor?

21           MAGISTRATE JUDGE EIFERT: Yes.

22           MR. CARTMELL: It, it shifts -- it -- there is a  
23 design history file. It is not boxes and boxes and boxes of  
24 things. I've seen them say that it's 10,000 pages. That is  
25 true if you put every design history file together.

1           It's so frustrating because the design history file is  
2 something that the FDA can come in and audit at any time.  
3 And it's not in boxes and boxes of documents. It is a file.  
4 It is in binders. It can be found like that. We can  
5 identify it and put on a, a sticker on it. We know exactly  
6 what is in it.

7           And we don't want to ask Mr. Smith about every single  
8 page of those. That's not our plan. Our plan is to get a  
9 document that the company who has by regulatory law the  
10 responsibility to be able to identify the file. That's it.

11           MAGISTRATE JUDGE EIFERT: I don't -- yeah. I  
12 don't --

13           MR. THOMAS: And I don't, I don't see where we're  
14 different.

15           MAGISTRATE JUDGE EIFERT: Well, I, I think what  
16 he's saying, Mr. Thomas, is he wants a witness to verify  
17 what is the file for the record. He wants that to be  
18 identified. He doesn't want to have to have 12 different  
19 witnesses talk about what they think the file consists of.

20           He wants, he wants a corporate representative to say,  
21 "This is the design history file. It's Bates numbers this  
22 to this. And this is the file." And I don't think that's  
23 unreasonable. They have, they have the right to know what  
24 the corporation considers to be the design history file.

25           MR. THOMAS: And, and we're prepared to do that,

1 Your Honor. We're prepared to give them a corporate  
2 representation that these Bates numbers of documents  
3 constitute the design history file for each of these  
4 products.

5 MAGISTRATE JUDGE EIFERT: All right.

6 Mr. Cartmell, why is that not acceptable?

7 MR. CARTMELL: Well, I, I think it's different. I  
8 don't think they want somebody on a video to say, "This is  
9 the file." They want to give us an interrogatory and they  
10 want to say, "That's match number X through X, and that's  
11 match number X through X," so that we can maybe, yeah, take  
12 that interrogatory response and try to use it with fact  
13 witnesses.

14 And, so, they have not given a corporate binding  
15 statement of what it is because what happens there is that  
16 we have to jump through all kinds of hoops. And what the  
17 fact witnesses say is, "Look, I haven't looked through that.  
18 I don't know if that's it. And, yeah, maybe they --  
19 somebody signs that. I don't know who signs that. But in  
20 order to say that that's it, I'd have to look through it."

21 MAGISTRATE JUDGE EIFERT: Well, I thought, I  
22 thought I just heard Mr. Thomas saying their witness would  
23 be prepared to do this tomorrow.

24 MR. CARTMELL: Oh, no. I think he's saying they  
25 want to give us an interrogatory (recording inaudible).



1           MAGISTRATE JUDGE EIFERT: No, I'm talking about --  
2    what I'm talking about, I'm talking about the witness  
3    tomorrow. That's all I'm talking about is what the witness  
4    is going to be prepared to do tomorrow.

5           Now, Mr. Thomas, will your witness be prepared to say  
6    what are the design history files?

7           MR. THOMAS: No, he will not be able to identify  
8    the Bates range of documents for the design history files  
9    for the products at issue.

10          MAGISTRATE JUDGE EIFERT: And why can he not do  
11   that?

12          MR. THOMAS: Can I defer to Mr. Combs on that  
13   issue? He's been working with the witness on that today.

14          MR. COMBS: Judge, he would not be able to do that  
15   because of the voluminous nature of it. I mean, it's,  
16   it's -- you know, Mr. Smith as the corporate representative  
17   for research and design is an engineer. He was not involved  
18   in collecting these documents, Bates stamping these  
19   documents, or producing these documents.

20          MAGISTRATE JUDGE EIFERT: Mr. Combs, he doesn't  
21   have to be --

22          MR. COMBS: We don't object to doing what, what  
23   the plaintiffs are asking, but it's going to be somebody  
24   else. It's going to be, you know, someone like a litigation  
25   paralegal who is going to sit there and who is going to

1 compare the Bates ranges and the produced versions and --  
2 for each of the design history files.

3 We're talking about six files, all of which are going  
4 to have multiple volumes. We're talking about a very large  
5 project. It's very -- you know, it's just not going to be  
6 an easy thing. It's going to be thousands of pages of  
7 material.

8 MAGISTRATE JUDGE EIFERT: Did somebody --  
9 Mr. Cartmell, did you ever ask in a request for  
10 production of documents for the design history file?

11 MR. CARTMELL: Yeah, we, we have asked for it, I  
12 believe, in the attached *duces tecum* to this deposition.

13 MAGISTRATE JUDGE EIFERT: I mean prior to this  
14 deposition, prior to the notice.

15 MR. ALYSTOCK: Your Honor, Bryan Aylstock. Yes,  
16 in our -- we did a comprehensive request for production back  
17 in July shortly after the discovery stay was lifted and we  
18 asked for the complete design history file on every product  
19 specifically.

20 We also asked for the complete SOP with revision  
21 histories. We've asked for complete IFUs, and we don't even  
22 have the first IFU for the TVT.

23 So, everything that we're talking about here has been  
24 asked for since July. And that's what's so frustrating.

25 MAGISTRATE JUDGE EIFERT: Well, then, I'm having

1     some, I'm having some trouble understanding why the  
2     corporate representative is unable to say what Bates number  
3     ranges are the design files. Somebody had to have collected  
4     those and stamped them at some time in the past. It doesn't  
5     have to be the witness who actually did it himself or  
6     herself. The witness just has to know what they are.

7             MR. THOMAS: And, Your Honor, we're prepared to do  
8     that, just not with this witness. We will give them an  
9     affidavit saying, "This is the design history file. These  
10    are the Bates ranges and numbers that are covered by that."  
11    And that's the corporate representation that that's the  
12    design history file for these products.

13            MAGISTRATE JUDGE EIFERT: Well, I don't understand  
14    why the witness can't do that. Now, I'm hearing you say the  
15    witness is not going to be prepared to do that tomorrow.  
16    And I think that is something that we'll have to address  
17    later as far as whether that is going to mean that your  
18    witness is not properly prepared because to me that doesn't  
19    sound like it was an overwhelming task.

20            If somebody put these things together almost a year  
21    ago, somebody ought to be able to tell this man which files  
22    are the design history files. I just don't understand why  
23    this is so difficult.

24            So, I don't know what to tell you about tomorrow. I, I  
25    can't hardly compel him to have that information for you if

1 he doesn't have it tomorrow. I mean, I'm hearing Mr. Thomas  
2 say he's not going to have it tomorrow.

3 What I ultimately am going to need to hear from you-all  
4 is whether that had been asked for in, in advance, whether  
5 that is something they had enough time to put together. I  
6 can't tell from topic B here whether, you know, that was  
7 even within the, the range of what it was you were asking  
8 for.

9 So, I think you've got some problems with these, these  
10 topics being overly broad. I don't know how much time  
11 you've given them to put this together. I think, though,  
12 that the plaintiffs have every right to have a human being  
13 say, "These numbers, these Bates stamp numbers are the  
14 design file." I think they have every right. And they can  
15 do it that way rather than have it done in an interrogatory  
16 if that's the way they want to do it. I don't think that's  
17 that unreasonable.

18 So, I'll tell you how I feel about that and that I  
19 think we'll have to take up later what will happen about  
20 this witness not being prepared to do it.

21 Let's move on, then, to C, members of the product  
22 development team.

23 MR. CARTMELL: Your Honor, this is the same thing.  
24 They, they don't want -- it just comes down to this. And we  
25 have met and conferred about this until our, you know, your

1 head is blue, but we can't come to an agreement.

2 They don't want to have somebody on the record testify  
3 and bind the company that these are people -- this is the  
4 list of people that was involved with the product  
5 development.

6 Now, their responses said that we're asking for, you  
7 know, dozens of names over dozens of years. And we're only  
8 asking for product development team, which is a very narrow  
9 period of time in each of these products, so that we don't  
10 have to go from witness to witness and they tell us they  
11 don't know or they give us one name and we try to figure out  
12 who are the key people to depose.

13 Our only interest in this is trying to narrow the scope  
14 so we don't spin our wheels so we save time, efficiency  
15 because we're trying to prepare seven cases for trial.

16 MAGISTRATE JUDGE EIFERT: Mr. Thomas.

17 MR. THOMAS: Your Honor -- thank you, Your Honor.  
18 We have produced the file information that identifies  
19 everybody associated with the product. The problem is  
20 "team" is overly broad. If they will allow us to identify  
21 the key people, as they say, that's something we can do.

22 The, the problem is binding the company to everybody on  
23 the team. When people come in and out on projects over a  
24 twelve-year period, it is really impossible to do. And we  
25 could go through the documents just like the plaintiffs

1 could and list everybody who ever touched the product. I  
2 don't think that's what the plaintiffs want.

3 We've given them the project leaders for each of the  
4 products. They can identify from those people the people  
5 who had relevant knowledge about the development or product  
6 at a particular time.

7 But for us to be compelled to have a witness list all  
8 the people that ever touched a product and bind the company  
9 or have to testify about what each of those people did with  
10 respect to the product in a particular time is, is  
11 unreasonable. And unless they narrow it to a specific area  
12 or specific responsibility, then it's, it's difficult or  
13 impossible for Dan Smith or anybody to do.

14 MAGISTRATE JUDGE EIFERT: I think, I think --

15 MR. CARTMELL: Your Honor, --

16 MAGISTRATE JUDGE EIFERT: I think what you're  
17 going to need to do with this one tomorrow is ask Mr. Smith  
18 questions about how the team -- who comprises the team,  
19 whether the team changes, just basic questions like that so  
20 that there is some foundation to understand.

21 You know, frankly, it seems, it seems odd to me that  
22 you don't know who would be the members of a team that works  
23 on your product. But I don't really know how complicated  
24 this whole process is, and we don't have any testimony about  
25 that at this point.

1           So, why don't you go ahead, Mr. Cartmell, and ask  
2   questions about that tomorrow and see what you can get. And  
3   then --

4           MR. CARTMELL: I will do that. I appreciate that.  
5   I would -- I'm sorry. Go ahead.

6           MAGISTRATE JUDGE EIFERT: Then you can come back.  
7   I'm sure we're going to have to have another deposition. I  
8   mean, obviously this witness is not going to be able to  
9   answer all these questions. So, if you can't work out these  
10  things before the next deposition, then you need to come  
11  back sooner. Don't wait until three days before the  
12  deposition. Come back sooner and then we can talk about  
13  what to do.

14          MR. CARTMELL: Okay. And I will say just with  
15  respect to Susan Lin, I asked the same thing. We asked the  
16  same thing. "Who are the members of the project teams from  
17  the regulatory standpoint?" They gave us a list. I said,  
18  "That's fine." We put a sticker on it. We marked it. I  
19  said, "Is this the list?" She said, "Yes." And I moved on.

20          MR. COMBS: Well, Judge, -- this is Phil Combs. I  
21  just want to point out that's very, very different to ask  
22  who, who were the people from a specific department that  
23  worked on a project -- product. That's very different than  
24  asking Dan Smith who's everyone from the company that worked  
25  on it which could involve multiple departments. You're

1 talking about, you're talking about a long list of people  
2 that would have involvement, and that's why it's hard. It's  
3 a lot of people.

4 MR. CARTMELL: It's just product development.

5 MAGISTRATE JUDGE EIFERT: I think what I'm  
6 hearing, though, is that perhaps a lot of these issues will  
7 be resolved when you get some testimony about them. You may  
8 just be talking about completely different things. And, you  
9 know, it's hard for me to tell that. But I'd say take a  
10 stab at it tomorrow and then we'll see what else needs to be  
11 done after this deposition is over.

12 Now, the next one is I which would be all project names  
13 of TVT-0. Is that one resolved?

14 MR. CARTMELL: We -- they've produced to us -- you  
15 saw in the motion today, the response today or yesterday,  
16 that for the first time, they gave us a list. They had told  
17 us they would give us a list. I said, "Phil or Ben, please,  
18 we need --" same thing. "We need to have a live witness who  
19 will tell us these are the names that can bind the company  
20 and be able to tell us why, you know, why they're named this  
21 or what it's for because that's discoverable. That's all we  
22 want. We're not going to spend a lot of time on it."

23 And the response was, "We'll give you a list. We don't  
24 want anybody live binding the corporation on a video saying,  
25 'Here's the names of the products.'" The only reason we're



1 doing this is to save time so we know our reviewers can look  
2 and say, "Oh, the TVT-Star is actually the TVT-O, or TVT-U  
3 is actually the TVT-Secur and here's what it means and here  
4 are all the names." That's all we want." And they don't  
5 want to have somebody on video bind the corporation on that.

6 MR. THOMAS: I think we've said so in our  
7 response. We've given you the list and we've said that the  
8 corporate (recording inaudible) summary is the (recording  
9 inaudible) accurate. That's what you want, isn't it?

10 MR. CARTMELL: Well, now, but then over multiple  
11 meet-and-confers that I would like to be able to say to the  
12 witness, "TVT-Secur used to be called TVT-Universal. Why is  
13 that, or what does that stand for?" Because what we've  
14 found in these cases is that sometimes there's meaning  
15 behind those, the names that are given. That's all I want.

16 MAGISTRATE JUDGE EIFERT: Okay. Well, let's,  
17 let's see how that goes tomorrow. You know, I, I don't, I  
18 don't quite understand the reservation on the part of the  
19 defendant to bind the corporation. The corporation is going  
20 to have to have a position, and somebody's going to have to  
21 testify to that position. I don't think you're going to be  
22 able to defend the case by producing a document every time  
23 there's an issue that comes up. I mean, there's going to  
24 have to be testimony. And that's the whole purpose of the  
25 30(b)(6) deposition.

1           So, I don't, I do not understand why you're not going  
2   to be prepared to have this person say, "These are the names  
3   of the projects." I mean, honestly, that just doesn't make  
4   any sense to me. But maybe, maybe your witness will be  
5   ready to do that.

6           MR. THOMAS: Your Honor, I think you misunderstood  
7   me. The witness will testify that those are the names of  
8   the product. He will bind the company to that tomorrow.

9           MAGISTRATE JUDGE EIFERT: All right. Why don't  
10   we, why don't we start with that and see where that goes.

11          Let's move on, then, to S which is the patents. And if  
12   I understood you, that one you think you have worked out.  
13   Is that correct?

14          MR. CARTMELL: I think there will be maybe an  
15   issue later, Your Honor, but I think we should do like you  
16   have suggested and see what comes up. And if it is an issue  
17   later and can't be worked out, we'll take that up later.

18          MAGISTRATE JUDGE EIFERT: Yeah. Let me say this  
19   to the defendants. I do agree with you that these topics  
20   are extremely broad. I, I understand the position the  
21   plaintiff is in because they probably don't have enough  
22   discovery yet to make these, these topics more narrow. But  
23   these are very broad topics and I can understand the problem  
24   the defendant is having with these topics.

25          Having said that, that's really only important when it

1 comes down to sanctions for offering a witness who's not  
2 prepared. That's why I'd like to go tomorrow and see how  
3 much you can (recording inaudible).

4 And if there are some really obvious things that your  
5 witness should have been prepared to answer and couldn't,  
6 then that's going to be a different story. If there's just  
7 some confusion about what all these topics involve, then I'm  
8 going to take that into consideration as well.

9 MR. CARTMELL: Okay. And we will seek to --  
10 because of what you've said, we're going to try to narrow it  
11 down. And I think patents is one place we already have  
12 narrowed it, you might have seen from the response, but  
13 we'll do it further.

14 MAGISTRATE JUDGE EIFERT: Yes. I think it needs  
15 to be narrowed on your notice because the witness -- they  
16 have to identify the best witness to represent the  
17 corporation. They have to know what you're going to ask  
18 about. If there is a universe of 5,000 sub topics under one  
19 of these topics, then there's no way they can have someone  
20 adequately prepared to cover all of those things. So, I  
21 think there's going to have to be some work on both sides  
22 here is kind of what I'm seeing.

23 All right. The last --

24 MR. CARTMELL: Then you're saying, Your Honor, --  
25 pardon me. Just to clarify, are you saying we need to

1 re-issue the notice? Because what we have been doing is  
2 just sort of by agreement from letters saying, "We will  
3 narrow these topics." But we're fine with re-issuing --

4 MAGISTRATE JUDGE EIFERT: Yeah. I think what you  
5 ought to do is take this deposition tomorrow, figure out how  
6 these, how these topics can be (recording inaudible) or at  
7 least how you can state them with a little more  
8 particularity so that the defendant can pin down what it is  
9 you're actually looking for, and re-issue them for the next  
10 deposition because that way, we'll all be on the same page.

11 MR. CARTMELL: Okay.

12 MAGISTRATE JUDGE EIFERT: The last, the last  
13 category that I have as there being an issue is the design  
14 control and validation manufacturing processes. Where are  
15 we with that one?

16 MR. CARTMELL: I, I believe from plaintiffs'  
17 perspective, same thing, Your Honor. We should go take the  
18 deposition and the -- it's a degree issue. They, they have  
19 said Dan Smith will only be prepared to talk about it from a  
20 10,000-foot perspective, and they may need somebody else to  
21 talk in more detail about it. That's where our argument  
22 was.

23 I just wanted to know -- and if there was another  
24 designee, I wanted them to designate that because if we get  
25 into this and our expert reports are due, we're sort of

1 running out of time.

2 MAGISTRATE JUDGE EIFERT: I understand. I  
3 realize, you know -- I, I sympathize with you people because  
4 you are on such a tight schedule and there is so much work  
5 to do. I don't know how you're doing it. And I feel really  
6 badly for you. But, having said that, you know, I want to  
7 try to do what I can to move the discovery on.

8 If you go ahead, Mr. Cartmell, and take this deposition  
9 tomorrow, maybe you'll be in a better position and you two  
10 will be able to work out a lot of these issues.

11 MR. CARTMELL: I do too. If you don't mind, I'd  
12 like to say one thing because it just, it's -- look -- and I  
13 think we're working well together and I don't blame -- you  
14 know, there's nothing here that I'm saying, nor any of us  
15 are saying, that is the fault of, of counsel. You know, a  
16 lot of stress is really going into this issue of deposition  
17 scheduling.

18 And, you know, for example, because we have seven  
19 products that we're trying to cover with Dan Smith. And  
20 they've identified him for 30 topics and we thought we would  
21 get, you know, a different witness on each topic.

22 We're never going to get done with this witness in four  
23 days. I mean, I can just tell you -- I know in New Jersey,  
24 Scott Ciarrocca, who was their 30(b)(6) on a lot of these  
25 same topics, one product was a three-day deposition.

1           And you have expressed, Your Honor, and I totally  
2   understand it, that you're concerned about these, the length  
3   of these depositions. And I, I guess I'm just bringing it  
4   up because I'm so concerned and nervous that we're going to  
5   be in a situation when we are supposed to, as fiduciaries on  
6   behalf of these thousands of cases across America, be trying  
7   to complete these depositions on six topics, six cases the  
8   people around America have, and we're going to finish this  
9   two days -- and I've sent them probably four e-mails saying,  
10   "Can you get me two more days for Dan Smith?" because I know  
11   what's going to happen. We're not going to get Dan Smith  
12   day three and four until July. Then we're not going to  
13   finish with Abbrevio and Exact. And we're not going to get  
14   days five and six until August and our reports are due.

15           And I'm just so -- I've got to be honest with you. I'm  
16   freaked out about this. Our scheduling is a major problem  
17   for this. And maybe it's something we can talk to you when  
18   we come to West Virginia about next week.

19           But I do want to have this sort of the center of the  
20   universe in the MDL, Bryan and Renee and I do. We have  
21   other lawyers from state courts saying, "Let us take these,  
22   you know, depositions here, you know, if they're going to  
23   not give you dates there." And we're trying like crazy to  
24   avoid that.

25           We don't -- we agree with Judge Goodwin that two bites

1 of the apple is not good. But we're also concerned as heck  
2 that -- from your perspective, I understand. It can look  
3 like four days with one witness is crazy. But from our  
4 perspective, it's seven cases and 30 topics.

5 MAGISTRATE JUDGE EIFERT: Well, I understand,  
6 yeah.

7 MR. THOMAS: Your Honor, just to shortcut this --  
8 Tom, you need to read your e-mails. We've, we've  
9 offered you two days in early June for, to come back and  
10 complete Mr. Smith.

11 MAGISTRATE JUDGE EIFERT: And, you know, maybe,  
12 maybe tomorrow you'll figure out that there are some other  
13 people that you need as well and you can get those  
14 scheduled. I definitely think we ought to talk about this  
15 next week because you are on such a tight schedule.

16 And I realize that there is a lot of information out  
17 there. There's a lot of work on both sides to get the  
18 documents produced. And it's a crazy, crazy schedule, no  
19 doubt about it. But maybe if we sit down, we can try to  
20 figure out some ways to expedite it.

21 I understand the depositions are going to be long but,  
22 you know, four days, I don't know how you're ever going to  
23 use that when the whole trial is only going to be twelve.  
24 So, --

25 MR. CARTMELL: Well, no, I know. And, you know,

1    when you think about it, less than -- you're talking about  
2    one trial. We're talking about trying to discover seven  
3    trials --

4                   MAGISTRATE JUDGE EIFERT: Right, right.

5                   MR. ALYSTOCK: We don't yet know what product it  
6    is. And we had talked about narrowing the products and  
7    kicking some of the products down the line.

8                   MAGISTRATE JUDGE EIFERT: Right.

9                   MR. ALYSTOCK: But that -- we weren't able to  
10   reach an agreement on that. So, I think the idea of maybe  
11   just sitting down with your help -- I think this call was  
12   very helpful, Judge, and I appreciate you doing that on  
13   short notice.

14                  MAGISTRATE JUDGE EIFERT: Well, certainly. I want  
15   to help you. And you'll have to understand that I, I'm not  
16   going to have the history that you-all have had and I  
17   don't -- so, it's harder for me to judge whether somebody's  
18   not working as well as they should or, you know, whether  
19   somebody's just asking for more than anybody could provide.

20                  So, it helps me to hear some of this history. But it's  
21   hard to do that when we're, when we're trying to do it, you  
22   know, this late in, in the deposition schedule.

23                  So, why don't you --

24                  MR. CARTMELL: I apologize. We probably -- I  
25   mean, in retrospect -- we've talked about it. It was three



1 days before. I honestly thought we'd send it over there and  
2 we'd maybe dialogue some more and maybe some of the things  
3 wouldn't come up.

4 But I personally may have made statements that I'm  
5 going to file a motion to compel, and they -- probably  
6 multiple times. And they probably thought I was such a  
7 wussy, and I did. And I probably -- you know, we've worked  
8 on this. I'm glad we did because we got some documents  
9 today. But I hear you loud and clear that it cannot be a  
10 situation when it's this close to the deposition. I get  
11 that.

12 MAGISTRATE JUDGE EIFERT: Well, and, you know, I  
13 mean, under the case law, if you hadn't filed the motion to  
14 compel and they showed up and they weren't prepared, then  
15 they would have had a problem because they didn't file a  
16 motion for protective order. So, --

17 MR. CARTMELL: I know. And I've seen your case  
18 law on that.

19 MAGISTRATE JUDGE EIFERT: Yes. So, I think -- I'm  
20 not sure of the strategy to file the motion to compel is  
21 good if you really want to have a useful deposition. And I  
22 think with the time frame, you have to do that. You know,  
23 on the flip side, if you just want to set up the defendants,  
24 you just don't say anything and let them not be prepared.  
25 But I'm glad you're not doing that because I think it's

1 better to try to work this out ahead of time so that these  
2 depositions do, are, are useful in some way. You don't have  
3 the time to take them four and five times, do you?

4 MR. CARTMELL: No, we don't.

5 MAGISTRATE JUDGE EIFERT: Okay.

6 MR. CARTMELL: We don't have the stamina, Judge.

7 MAGISTRATE JUDGE EIFERT: Well, I will be around  
8 tomorrow. If something comes up at the deposition and you  
9 need help, you can just call me.

10 MR. CARTMELL: Okay. Thank you very much for your  
11 time. We appreciate it.

12 MAGISTRATE JUDGE EIFERT: Thank you. Thank  
13 you-all. Bye-bye.

14 (Proceedings concluded)

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1 I, Lisa A. Cook, Official Reporter of the United  
2 States District Court for the Southern District of West  
3 Virginia, do hereby certify that the foregoing is a true and  
4 correct transcript, to the best of my ability, from the  
5 record of proceedings in the above-entitled matter.

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7

8 s\Lisa A. Cook

May 24, 2013

9 Reporter

Date

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